

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARWIN FRANKLIN MILLER,

Defendant-Appellant.

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UNPUBLISHED

November 18, 2003

No. 242173

Midland Circuit Court

LC No. 01-001013-FH

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of domestic assault, third offense, MCL 750.81(4), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant, defendant's former girlfriend, testified that defendant pushed her to the floor, slammed her head on the floor, and struck her in the face several times. A physician testified that complainant had a hemorrhagic contusion just above her left ear, and that while such an injury was consistent with having been struck multiple times in that area, it was not consistent with a simple fall. Defendant denied that he shoved complainant to the floor, struck her head on the floor, or hit her in the face. He maintained that complainant fell in the bathroom and threatened to commit suicide. On cross-examination, defendant replied in the affirmative when the prosecutor asked him if complainant had lied when she testified that he assaulted her.

During closing argument, defense counsel stated that while the prosecutor's objective was to prosecute the case, his objective was to present the defense case. During rebuttal, the prosecutor stated that his motive was to seek truth and justice, and remarked that he needed the jury's assistance to accomplish that task. Defendant did not object to the prosecutor's argument.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). "No error requiring reversal

will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

It is improper for a prosecutor to ask a defendant to comment on the credibility of a prosecution witness. Credibility determinations are made by the trier of fact. An error of this type is reviewed under a harmless error analysis. *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). A prosecutor may not urge jurors to convict a defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A civic duty argument is improper because it injects issues into the trial which are broader than the defendant's guilt or innocence, and because it encourages jurors to suspend their own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). A prosecutor may not ask the jury to convict the defendant based on the prestige of his office. *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985), overruled on other grounds by *People v Gray*, 466 Mich 44; 642 NW2d 660 (2002).

Defendant argues that the prosecutor denied him a fair trial by asking him if the complainant lied when she testified that he assaulted her and by stating during closing argument that he was seeking truth and justice. We disagree and affirm defendant's conviction. Defendant did not object to the prosecutor's statements; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The prosecutor improperly questioned defendant regarding complainant's credibility; however, reversal is not warranted under the circumstances. The prosecutor asked a single question, which defendant answered directly. This did not foreclose the jury's consideration of defendant's theory that the complainant fell and hit her head. Any prejudice resulting from the single question could have been cured by a timely instruction. *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985); *Leshaj, supra*.

The prosecutor's comment that he was seeking truth and justice was made in direct response to defense counsel's argument that the prosecutor was present only to prosecute the case. *Schutte, supra*. Even if the prosecutor's remark was improper, reversal is not warranted. Any prejudice could have been cured by a timely instruction. *Leshaj, supra*. Moreover, the trial court instructed the jury that it was to determine the facts, that it was to consider only properly admitted evidence, and that the arguments of the attorneys were not evidence. Any error that occurred did not seriously affect the fairness of the proceedings. *Carines, supra*.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Jane E. Markey  
/s/ Patrick M. Meter